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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-965

JAMES A. FARRELL AND LOUIS T. DILORENZO,
Petitioners,

v.

HUGH CAREY, as Governor of the State of New York, ERNEST L. BOYER, as Chancellor of the State University of New York, and ALBERT W. BROWN, as President of the State University College at Brockport,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Louis T. DiLorenzo and James A. Farrell pray that a writ of certiorari issue to review the final judgment and decree of the New York Court of Appeals entered in their cases on September 21, 1978.

OPINIONS BELOW

The order of the New York Court of Appeals, dismissing the appeals in these cases, entered on September 21, 1978, is unreported and is reproduced in Appendix A, *infra*, p. 1a. The judgment of the Appellate Division,

Fourth Department, is reported at 405 N.Y.S.2d 356 (App. Div. 1978), and is reproduced in Appendix B, *infra*, pp. 3a-18a. The decisions of the Supreme Court, Monroe County, entered in these cases on May 24, 1976 are unreported and are reproduced in Appendix C, *infra*, pp. 19a-26a.

JURISDICTION

The final judgment and decree of the New York Court of Appeals was entered on September 21, 1978; this Petition was filed within 90 days of that final order. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Does the Fourteenth Amendment Permit a State University Professor's Right to Due Process in the Termination of a Tenured Appointment to be Waived by a Collective Bargaining Agreement?

II. Is the Effectiveness of a Waiver of Due Process by Collective Agreement to be Measured by the Standards Established by this Court for the Waiver of Due Process in Other Civil Settings?

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, Section 1, cl. 3

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

A. Procedural History

James A. Farrell and Louis T. DiLorenzo held tenured professorships in the State University College at Brockport of the State University of New York. Tenure, or

"continuing appointment," as it is defined by the University's regulations, is a right to continue in one's academic appointment until retirement, subject to termination upon certain express conditions, including *inter alia* "financial retrenchment." 8 NYCRR §§ 335.5, 338.14 (1974). By letter of January 26, 1976, from the President of the State College at Brockport, Professors Farrell and DiLorenzo were given a month's notice that their appointments would be terminated; the letter explained that these terminations constituted "retrenchment" necessitated by an asserted reduction in the College's operating budget.

At the time of these terminations, a collective bargaining agreement was in effect between the State and the United University Professions, Inc. ("UUP"), the collective bargaining agent for the professional staff of the SUNY system under New York's public employment collective bargaining law. N.Y. Civil Service Law §§ 200-214 (McKinney 1973). The agreement dealt with retrenchment of employees; its provisions were fully set out in the Appellate Division's opinion, appended here as Appendix B, *infra*. In essence, the State and the UUP agreed that the sole and exclusive means of reviewing retrenchment decisions was through the arbitration provision of the collective agreement. However, under the agreement, a terminated tenured professor could not contest the existence of the financial condition that was asserted to justify the termination, nor could he contest the reasonableness of the standards and procedures adopted by the University's administration to single out his appointment for termination.

Accordingly, Professors Farrell and DiLorenzo sought relief in state court. They asserted *inter alia* that the Fourteenth Amendment required that they be given an opportunity to contest whether or not a financial condition existed that truly justified the termination of their

appointments, and whether reasonable standards were adopted and fairly applied in singling their appointments out for termination. Complaint of Louis T. DiLorenzo, ¶¶ 17, 18, 21, 31; Petition of James A. Farrell, ¶¶ 12, 13, 17, 20, 21. They further asserted that no relief was available under the collective agreement to vindicate these constitutional rights. DiLorenzo Complaint at ¶ 19, Farrell Petition at ¶ 23.

The State moved to dismiss for failure to state a cause of action. The motion did not dispute that the agreement foreclosed review in the manner plaintiffs asserted. Rather, the State asserted that the collective agreement acted as a "waiver" of plaintiffs' constitutional rights. The trial court agreed, and granted the State's motion to dismiss, relying exclusively upon the theory of "waiver" adopted in the decision of the Appellate Division, Fourth Department, in *Antinore* v. *State of New York*, 371 N.Y.S.2d 213 (4th Dept. 1975). (The trial court's decisions are reproduced as Appendix C, *infra.*). Subsequent to the trial court's decision, the New York Court of Appeals affirmed *Antinore* by memorandum, 40 N.Y.2d 921, 389 N.Y.S.2d 576, 358 N.E.2d 368 (1976). A Writ of Certiorari was not sought in *Antinore* itself.

Professors Farrell and DiLorenzo appealed to the Appellate Division, Fourth Department; their appeals were consolidated by the Appellate Division. They pointed out that the constitutional test for "waiver" of due process in civil matters, adopted by this Court, had not been applied —or even considered. More important, Professors Farrell and DiLorenzo argued that the "waiver" theory adopted in *Antinore* was constitutionally infirm. The Appellate Division nevertheless affirmed, relying entirely on *Antinore*. That opinion is set out as Appendix B, *infra.*

Appeal to the New York Court of Appeals was sought under New York CPLR § 5601(b)(1) as of right; given the

disposition by the Appellate Division, the sole questions presented concerned the constitutionality of the *Antinore* doctrine.[1] However, the State moved to dismiss the appeal for want of substantiality in the federal constitutional question presented, on the ground that the issues were fully disposed of by the Court of Appeals' affirmance in *Antinore*. Notice and Motion to Dismiss Appeals, July 12, 1978. The Court of Appeals granted the State's motion to dismiss the appeals on September 21, 1978. Appendix A, *infra.*

B. The Crucial Role of the *Antinore* Doctrine

Customarily, a petition for a writ of certiorari to a state's highest court would be accompanied by that court's opinion concerning the federal constitutional questions presented. In dismissing these appeals, brought as of right, the New York Court of Appeals declined to supply any more detailed expression of opinion. However, the questions presented to the New York Court of Appeals solely concerned the constitutional validity of New York's *Antinore* doctrine. Thus, the refusal of the New York Court of Appeals to entertain these appeals, upon the strength of the *Antinore* doctrine, speaks as eloquently as any more refined opinion could as to how that court views the constitutional vitality of the theory it embraced in *Antinore.*[2]

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[1] The questions presented were stated in the Brief of Appellants in Support of Jurisdiction at 11:

> [A]re an individual's constitutional rights subject to waiver by a majority organization and, if they are, is the effectiveness of the waiver of Constitutional rights to be measured by standards independently commanded by the Constitution?

[2] An appeal brought as of right under CPLR 5601(b)(1) may be dismissed by the New York Court of Appeals for want of substantiality in the constitutional question presented. The test adopted by that court is identical with the test adopted by this Court for the dismissal of an appeal for want of a substantial federal question. *See* Cohen & Karger, POWERS OF THE NEW

The result in these cases provides a striking illustration of the operation of the *Antinore* doctrine. Two tenured professors have been summarily terminated by the State and denied any opportunity to contest the very existence of the ground asserted as justifying their terminations,[3] and any opportunity to contest whether reasonable standards were adopted and fairly applied in singling them out for termination. They may not be so heard because, under the *Antinore* doctrine, these constitutional rights have been waived by a collective agreement. That the agreement had that purport is not in dispute; in fact, that is precisely what Petitioners alleged in their pleadings, which the State's motion to dismiss accepted as accurate for the purposes of the motion. Thus, the sole question presented by this Petition is the constitutional validity of the *Antinore* doctrine applied, at the threshold, to defeat state judicial determination of Petitioners' constitutional claims.[4]

YORK COURT OF APPEALS, § 55 at 253 (1952) (and the cases cited therein). It is because a dismissal of an appeal upon such a ground is a disposition "on the merits of the case," *Ohio ex rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959) (memorandum of Brennan, J.), that the Writ of Certiorari in these cases is properly directed to the New York Court of Appeals rather than to the Appellate Division.

[3] In January, 1978, the Higher Education Committee of the State Assembly in New York issued a REPORT ON RETRENCHMENTS IN HIGHER EDUCATION 1977. After review of the actual budgetary situation, the report concluded that, unlike the City University of New York, the State University "was not under budgetary mandate or constraint to terminate" tenured faculty. *Id.* at 8.

[4] Several federal and state courts have considered the subsidiary question of the rights the Fourteenth Amendment does afford tenured professors terminated due to financial exigency. *Johnson* v. *Board of Regents*, 377 F. Supp. 217 (W.D. Wis. 1974), *aff'd mem.*, 510 F.2d 975 (7th Cir. 1975); *Levitt* v. *Board of Trustees*, 376 F. Supp. 945 (D. Neb. 1974); *Bignall* v. *North Idaho College*, 538 F.2d 243 (9th Cir. 1976); *Klein* v. *Board of Higher Educ.*, 434 F. Supp. 1113 (S.D.N.Y. 1977); *Brady* v. *Board of Regents*, 242 N.W.2d

REASONS FOR GRANTING THE WRIT

1. These cases present significant constitutional issues not previously passed upon by this Court.

The instant cases were disposed of by the trial court and affirmed by the appellate courts on the basis of New York's *Antinore* doctrine; thus, these cases place in issue the constitutionality of that doctrine: does the Fourteenth Amendment permit a collective bargaining agent in the public sector to waive rights guaranteed by the Fourteenth Amendment and, even if such a waiver is permissible, does the Fourteenth Amendment subject a waiver by collective agreement to the same standards the Court has established for the waiver of due process in other civil settings? These issues have not previously been directly passed upon by this Court; their significance cannot be minimized.

Even viewed narrowly as concerning the abrogation of due process for tenured professors, the significance of the issues transcends the 6,600 tenured faculty of the SUNY system. Twenty states, in addition to New York, have adopted laws allowing collective bargaining for college and university faculty either specially or, more commonly, as in New York, as part of a comprehensive public bargaining law.[5] Tens of thousands of faculty

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616 (Neb. 1976). The courts below failed to reach that question because the *Antinore* doctrine rendered it moot.

Inasmuch as the only questions presented by this Petition concern the constitutionality of the *Antinore* doctrine, this Petition does not call upon this Court to define what the Fourteenth Amendment would have required in the absence of the "waiver." The effect of an invalidation of *Antinore* upon constitutional grounds would merely return the instant cases to state court for a judicial determination, in light of the above cases, of what the due process clause requires.

[5] Alaska Stat. §§ 23.40.070-23.40.260 (1972); Conn. P.A. 566, L. 1975, §§ 1-11; Del. Code tit. 19. §§ 1301-1312 (1974); Fla. Stat.

at more than 150 public four-year institutions throughout the United States are currently represented by collective bargaining agents. Carnegie Council on Policy Studies in Higher Education, FACULTY BARGAINING IN PUBLIC HIGHER EDUCATION, Table 1, Appendix B (1977). Thus, the ability of the state, by collective agreement, to deprive tenured professors of rights guaranteed by the Fourteenth Amendment is of considerable national significance.

But more important, although this Court's decisions in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), directly concerned professorial tenure in higher education, they clearly establish that any public employee with a similar state-granted entitlement to his job, such as a tenured schoolteacher or a permanent civil servant, has a right to due process under the Fourteenth Amendment in the termination of his employment. *Cf. Bishop* v. *Wood*, 426 U.S. 341 (1976) (policeman held to have no such property interest as to engender a requirement of constitutional due process). In fact, the *Antinore* doctrine was adopted by the New York Court of Appeals in a case arising out of the termination of a permanent civil servant. Thus, the *Antinore* doctrine has a direct and immediate impact upon the constitutional rights of perhaps two hundred thousand to three hundred thousand tenured

§§ 447.201-447.607 (1976 Supp.); Hawaii Rev. Stat. §§ 89.1-89.20 (1975 Supp.); Iowa Code §§ 20.1-30.27 (1976 Supp.); Kans. Stat. §§ 75-4321-75-4337 (1975 Supp.); Me. Rev. Stat. tit. 26, §§ 1021-1034 (1975-76 Supp.); Mass. Gen. Laws ch. 150E, §§ 1-15 (1976); Mich. Comp. Laws §§ 423.201-423.216 (1967); Minn. Stat. §§ 179.61-179.76 (1976 Supp.); Mont. Rev. Codes §§ 59-1601-59-1617 (1975 Cum. Supp.); Neb. Rev. Stat. §§ 48-401-48-838 (1974); N.H. Rev. Stat. Ann. §§ 273-A:1-273-A:16 (1975); N.J. Stat. §§ 34:13A-1-34:13A-11 (1976 Supp.); Ore. Rev. Stat. §§ 243.650-243.782 (1975); Pa. Stat. tit. 43, §§ 1101-101-1101.2301 (1976 Supp.); R. I. Gen. Laws §§ 36-11-1-36-11-6 (1974); S.D. Comp. Laws § 3-18-1-3-18-17 (1974); Vt. Stat. tit. 3, §§ 901-1007 (1975).

public employees in New York State.[6] It further follows that the validity of the theory of waiver of constitutional rights by collective agreement is of intense concern to an even larger number of public employees elsewhere who are engaged in collective bargaining in the public sector.[7]

2. The *Antinore* doctrine is inconsistent with decisions of this Court concerning the relationship of majority rule to constitutional rights.

In *City of Madison* v. *Wisconsin Employment Relations Commission*, 427 U.S. 167 (1976), this Court held that a public employee's First Amendment right of access to speak in a public forum could not be limited, even when the subject of his speech concerned an item then under negotiation by the public employer with the union that represented him, and the justification asserted for the limitation was the need to protect the system of exclusive representation by the majority organization. The

[6] The probationary period for state employees is quite brief. Rules and Regulations of the New York Civil Service Commission, Rule 4.5 (1972). As of March 31, 1976 there were 154,704, primarily regular full-time state employees in New York, exclusive of the State University. New York State Dept. of Civil Service, *March 31, 1976 Distribution of N.Y. State Positions by County and Agency* (Aug. 1976). The probationary period for state and municipal civil servants in the competitive class is fixed by rule. N.Y. Civil Service Law, § 63 (McKinney 1973). In 1977, there were 120,224 municipal and county employees classified in the "permanent competitive class" exclusive, however, of New York City. New York State Civil Service Commission, *1977 Municipal Civil Service in New York State—Summary of Annual Reports*. In 1977-1978 there were 144,826 tenured schoolteachers in New York's public schools. Letter of November 6, 1978 from Vito W. Longo, New York State Education Department (Appendix D). Thus, the estimate of up to three hundred thousand public employees directly affected by the *Antinore* doctrine is conservative.

[7] As of 1974 there were almost 1.5 million union members in state and local government. HANDBOOK OF LABOR STATISTICS 1977, U.S. DEPT OF LABOR BULL. 1966, Table 134 at 291 (1977).

reason is simply that the First Amendment limits the power of the political majority; thus, it would not have made a difference, for constitutional purposes, had the prohibition in *City of Madison* been contained in a collective agreement rather than in an order of the Wisconsin Employment Relations Commission.

This Court has taken a similar view of the Fourteenth Amendment. "One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to a vote, they depend on the outcome of no elections." *West Virginia Board of Educ.* v. *Barnette*, 319 U.S. 624, 637 (1943). "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736-37 (1964). It would be patently inconsistent with these decisions, and constitutionally anomalous, if an individual's Fourteenth Amendment rights could be submitted to a vote of his fellow employees, or disposed of merely by agreement between the State and a union's leadership. Yet that is precisely what the *Antinore* doctrine accomplishes.[8]

The better view, more in keeping with *City of Madison* and the decisions noted above, is that the Constitution is a limit upon the government; it should make no difference whether government acts by issuing a rule unilaterally or issues the rule after meeting and conferring with a union—it remains a government rule and so must withstand constitutional scrutiny. As Mr. Justice Powell recently put it in an analogous situation,

> The collective-bargaining agreement to which a public agency is a party is not merely analogous to legislation; it has all the attributes of legislation for the subjects with which it deals. Where a teachers' union, for example, acting pursuant to a State statute authorizing collective bargaining in the public sector, obtains the agreement of the school board that teachers residing outside the school district will not be hired, the provision in the bargaining agreement to that effect has the same force as if the school board had adopted it by promulgating a regulation . . . .
>
> [A]ccordingly, the Board's collective bargaining agreement, like any other enactment of state law, is fully subject to the constraints that the Constitution imposes on coercive governmental regulation. *Abood* v. *Detroit Board of Educ.*, 431 U.S. 209, 253 (1977) (Powell, J. concurring).

[8] It is for this reason that initial scholarly reaction to the *Antinore* doctrine has been strongly negative. Aaron, *Procedural Due Process and the Duty of Fair Representation in Public Sector Grievance Disputes*. LABOR RELATIONS LAW IN THE PUBLIC SECTOR (A. Knapp ed. 1977) 179, 184. Koretz & Rabin, 1975 *Survey of New York Law*, 27 Syr. L. Rev. 139, 159 (1976).

By this analysis, the authentic issue in *Antinore* itself was not whether a collective agreement operated to "waive" a tenured civil servant's constitutional right to due process, but whether arbitration of his dismissal satisfied the minimum requirements of the due process clause. See *Mills* v. *Long Island Rail Road Co.*, 515 F.2d 181 (2nd Cir. 1975) (holding that arbitration can satisfy the due process clause), and *Chung* v. *Park*, 514 F.2d 392 (3d Cir.), *cert. den.*, 423 U.S. 948 (1975) (sustaining the use of arbitration for the dismissal of a tenured professor against a due process challenge).

To be sure, the practical demands of the system of collective bargaining may play a role in determining the question of constitutionality of a particular rule embodied in a public employment collective agreement. For example, in *Abood* v. *Detroit Board of Educ.*, *supra*, the Court observed that the "same important government interests . . . [recognized in support of agency fees in the private sector] support the impingement upon associational freedom created by the agency shop" in the public sector. *Id.* at 225. But under the *Antinore* doctrine,

the public employee cannot be heard to complain that even *after* appropriate consideration of the needs of the system of collective bargaining, the agreement acts nevertheless as an impermissible infringement of his Fourteenth Amendment rights, because his constitutional rights are deemed "waived".

The instant cases strikingly illustrate how the waiver theory forecloses constitutional scrutiny. These summarily terminated tenured professors could not contest, upon constitutional grounds, decisions "reserved by the collective agreement exclusively to the State" (Appendix B *infra* at 15a) because their constitutional right so to contest was held to have been "waived" by that very reservation.

3. The *Antinore* doctrine is inconsistent with decisions of this Court governing the waiver of due process in other civil settings.

The theory of "waiver" of constitutional rights by collective agreement is plainly inconsistent with this Court's construction of the Constitution. Point 2 *supra*. But even if "waiver" is a constitutionally appropriate analysis, the *Antinore* doctrine falls afoul of the standards established by this Court for the determination of an effective waiver of due process in the civil setting.

The standards established by this Court governing the effectiveness of a waiver of due process in civil cases has borrowed from the standards established in criminal cases. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) followed in *D. H. Overmeyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972), and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). Inasmuch as the right to due process is a personal right, to be constitutionally effective the waiver must be made by the individual. *Schneckcloth* v. *Bustamonte*, 412 U.S. 218, 246 (1973). ("[I]t is inconceivable that the Constitution could countenance the waiver of a defendant's right

to counsel by a third party. . . .") *Cf. Brookhart* v. *Janis*, 384 U.S. 1 (1966) (no waiver of client's constitutional rights by attorney over the objection of the client). However, under the *Antinore* doctrine, the requirement that the individual actually agree to the relinquishment of his constitutional rights is jettisoned. The Appellate Division put it succinctly: these faculty members are bound by the waiver by virtue of "their membership in the bargaining unit, irrespective of whether they personally supported the contract when approved." The result cannot be reconciled with the standards this Court has established governing the waiver of individual constitutional rights.

Moreover, this Court has long held that the loss of fundamental rights, as a matter of Constitutional law, should not be presumed or lightly implied. *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U.S. 292, 307 (1937), *Aetna Insurance Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937). Accordingly, this Court has required that a waiver of due process in the civil setting be not only intentional, but "voluntary," that is, made between parties of equal bargaining power. *D. H. Overmeyer Co.* v. *Frick Co., supra; Fuentes* v. *Shevin, supra.* Assuming *arguendo* that "waiver" is the constitutionally appropriate analysis at all, Point 2, *supra*, and assuming further that a majority organization may waive an individual's constitutional rights, these decisions require a finding that the constitutional standards for determining the effectiveness of a waiver have been met. Thus, in the instant case, there would have had to have been a finding that the union enjoyed at least a rough equality of bargaining power with the State. The trial court made no such finding, and the appellate courts refused to consider the standards set down by this Court as relevant to the determination of the constitutional effectiveness of a waiver of due process by collective agreement.

Surely, there are weak unions in the public sector as well as strong ones.[9] By obviating any factual inquiry into the relative bargaining power of the State and the union otherwise commanded by this Court's decisions, the *Antinore* doctrine frees the State, in effect, to command a loss of individual constitutional rights in return for the most limited concessions to which a hard-pressed union would have no practical alternative but to accede. Such a result is even more likely where, as in the instant case, those adversely affected by the waiver—the tenured faculty—constitute a minority of the overall bargaining unit.

4. The *Antinore* doctrine engenders an intolerable conflict between the state and federal courts in New York concerning the construction of the Fourteenth Amendment.

In *Connecticut State Federation of Teachers* v. *Board of Educ. Members*, 538 F.2d 471 (2nd Cir. 1976), the Second Circuit was confronted with a challenge, on First Amendment grounds, to provisions of a collective agreement made with a majority organization. That court's analysis of the issue is identical with the decisions of this Court, adverted to by Petitioners in Point 2, *supra*:

> [A] dispute, commonplace in the private sector, becomes constitutional litigation by virtue of the fact that public employers (the school boards) are involved, rather than private entities. . . . Mindful of

[9] The Director of New York's Office of Employee Relations, the state's chief negotiator, has adverted to the lack of bargaining power of faculty unions in higher education. Wollett, *State Government—Strategies for Negotiations in an Austere Environment: A Management Perspective*, 27 Lab. L.J. 504, 509 (1976). A study of collective bargaining in the State University of New York expressly adverted to the "weakness" of the SUNY union. E. Duryea & R. Fisk, COLLECTIVE BARGAINING, THE STATE UNIVERSITY AND THE STATE GOVERNMENT IN NEW YORK 31 (1975).

> the undesirability of becoming entangled in the operation of local school systems, we nevertheless must address this case in a constitutional, rather than a private law, framework. *Id.* at 478.

To similar effect see Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 Cin. L. Rev. 669, 670-71 (1975).

How radically this constitutional analysis differs from the *Antinore* doctrine is illustrated by a federal decision in New York that vindicates precisely the same constitutional rights that Petitioners sought to vindicate in state court, despite a collective agreement indistinguishable from that involved in the instant cases. *Klein* v. *Board of Education*, 434 F. Supp. 1113 (S.D.N.Y. 1977) (holding, despite unreviewability under the collective agreement, that the Fourteenth Amendment required that tenured faculty be permitted to contest whether a bona fide financial exigency existed and whether the institution adopted and applied a uniform set of procedures for meeting that emergency). These federal decisions cannot be reconciled with *Antinore*; in effect, the Fourteenth Amendment means one thing in the federal courts in New York and another in the state courts.[10]

[10] Inasmuch as the Supreme Court of Nebraska had rejected the waiver theory in a case strikingly similar to the instant cases, *Brady* v. *Board of Regents*, 242 N.W.2d 616 (Neb. 1976), it appears as well that the Fourteenth Amendment means one thing in New York's highest court and another in Nebraska's. There is analogous judicial confusion upon the vitality of the waiver theory elsewhere. COMPARE *Kewin* v. *Board of Educ.*, 65 Mich. App. 472, 237 N.W.2d 514 (1972) (collective agreement cannot waive teacher's constitutional right to individualized maternity leave treatment) WITH *Cary* v. *Board of Educ.*, 427 F. Supp. 945 (D. Colo. 1977) (collective agreement waived teachers' First Amendment right to academic freedom).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

MATTHEW W. FINKIN
School of Law
Southern Methodist University
Dallas, Texas 75275
(214) 692-2583

Counsel for Petitioners

Appendices

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twenty-first day of September A.D. 1978.

PRESENT, HON. CHARLES D. BREITEL,
Chief Judge, presiding

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4 Mo. No. 787

LOUIS T. DILORENZO,
Appellant,

vs.

HUGH CAREY, as Governor &c., and ERNEST L. BOYER, as Chancellor &c., &ano., &c.,
Respondents.

JAMES A. FARRELL,
Appellant,

vs.

HUGH CAREY, as Governor &c., and ERNEST L. BOYER, as Chancellor &c., &ano., &c.,
Respondents.

A motion having heretofore been made herein upon the part of the respondents to dismiss the appeals taken by the appellants in the above causes to this Court, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks to dismiss the appeal in *DiLorenzo* v. *Carey*, be and the same hereby is granted and the appeal dismissed, without costs, upon the grounds that the modification at the Appellate Division is not substantial (CPLR 5601[a][iii]) and no substantial constitutional question is directly involved (CPLR 5601[b][1]); and it is

ORDERED, that the said motion, insofar as it seeks to dismiss the appeal in *Farrell* v. *Carey*, be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved (CPLR 5601[b][1]).

/s/ Joseph W. Bellacosa

JOSEPH W. BELLACOSA
Clerk of the Court

APPENDIX B

301

SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

PRESENT: MARSH, P.J., DILLON, HANCOCK, DENMAN, WITMER, JJ.

Appeal No. 1

LOUIS T. DILORENZO,
Appellant,

v.

HUGH CAREY, as Governor of the State of New York, ERNEST L. BOYER, as Chancellor of the State University of New York, and ALBERT W. BROWN, as President of the State University College at Brockport,
Respondents.

The above named Louis T. DiLorenzo, plaintiff in this action, having appealed to this Court from a judgment of the Supreme Court, entered in the Monroe County Clerk's office on June 4, 1976 and said appeal having been argued by Matthew Finkin of counsel for appellant, Paul Harrison of counsel for respondents, and submitted by Matthew Finkin for the American Association of University Professors, Amicus Curiae and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be, and the same hereby is unanimously

modified by deleting the provision declaring the rights of the parties and by dismissing the complaint and as modified the judgment is affirmed without costs.

Opinion by Marsh, P.J., which is hereby made a part hereof.

Entered: May 26, 1978

MARY F. ZOLLER
Clerk

Supreme Court)
Appellate Division,)
Fourth Judicial Department,)
Clerk's Office, Rochester, N. Y.)

I, MARY F. ZOLLER, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 26 day of May 1978

[SEAL]

/s/ Mary F. Zoller
Clerk

302

SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

PRESENT: MARSH, P.J., DILLON, HANCOCK, DENMAN, WITMER, JJ.

Appeal No. 2

JAMES A. FARRELL,
Appellant,

v.

HUGH CAREY, as Governor of the State of New York, ERNEST L. BOYER, as Chancellor of the State University of New York, and ALBERT W. BROWN, as President of the State University College at Brockport,
Respondents.

The above named James A. Farrell, petitioner in this proceeding, having appealed to this Court from an order and judgment (one document) of the Supreme Court, entered in the Monroe County Clerk's office on June 1, 1976 and said appeal having been argued by Richard Evans of counsel for appellant, Paul Harrison of counsel for respondents, and submitted by Matthew Finkin for the American Association of University Professors, Amicus Curiae and due deliberation having been had thereon,

It is hereby ORDERED, That the order and judgment so appealed from be, and the same hereby is unanimously affirmed without costs.

Opinion by Marsh, P.J., which is hereby made a part hereof.

Entered: May 26, 1978

MARY F. ZOLLER
Clerk

Supreme Court)
Appellate Division,)
Fourth Judicial Department,)
Clerk's Office, Rochester, N. Y.)

I, MARY F. ZOLLER, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 26 day of May 1978

[SEAL]

/s/ Mary F. Zoller
Clerk

This opinion is uncorrected and subject to revision before publication in the New York reports

SUPREME COURT
STATE OF NEW YORK
APPELLATE DIVISION
FOURTH DEPARTMENT

#301/1978

Appeal No. 1

LOUIS T. DILORENZO,
Appellant,

—vs.—

HUGH CAREY, as Governor of the State of New York, ERNEST L. BOYER, as Chancellor of the State University of New York, and ALBERT W. BROWN, as President of the State University College at Brockport,
Respondents.

#302/1978

Appeal No. 2

JAMES A. FARRELL,
Appellant,

—vs.—

HUGH CAREY, as Governor of the State of New York, ERNEST L. BOYER, as Chancellor of the State University of New York, and ALBERT W. BROWN, as President of the State University College at Brockport,
Respondents.

Argued: April 6, 1978

Decided: May 26, 1978

PRESENT:

HON. JOHN S. MARSH, Presiding Justice
HON. MICHAEL F. DILLON,
HON. STEWART F. HANCOCK, JR.
HON. M. DOLORES DENMAN,
HON. G. ROBERT WITMER, Associate Justices

#301—Appeal from Judgment of Monroe Supreme Court, Blauvelt, J. in declaratory judgment action.

#302—Appeal from Judgment of Monroe Supreme Court, Blauvelt, J. in Article 78 proceeding.

APPEARANCES:

#301—JOAN DE R. O'BYRNE
25 East Main Street
Rochester, New York 14614
Attorney for Appellant DiLorenzo
(Matthew Finkin, Esq., of counsel)

#302—HARRIS, MALONEY, HORWITZ & EVANS
226 Powers Building
Rochester, New York 14614
Attorneys for Appellant Farrell
(Richard Evans, Esq., of counsel)

#301 &
302—RUTH KESSLER TOCH, Solicitor General
HON. LOUIS J. LEFKOWITZ, Attorney General
The Capitol
Albany, New York 12224
Attorney for Respondents
(Paul Harrison, Esq., of counsel)

#301 &
302—MATTHEW W. FINKIN, ESQ.
School of Law, Southern Methodist University
Dallas, Texas 75222
Attorney for American Assn. of University Professors, Amicus Curiae

MARSH, P.J.:

Petitioner James A. Farrell appeals from an order and judgment which granted defendants' motion to dismiss the petition and vacate a temporary restraining order. Plaintiff Louis T. Di Lorenzo appeals from a judgment which declared that any relief to which plaintiff was entitled could be obtained solely within the procedures established by the collective bargaining agreement between United Universities Professors, Inc. and the State University of New York.

In his petition petitioner Farrell asserts that his first appointment with State University College at Brockport was as a counsellor with the Campus School on September 1, 1965 for a two-year period. On September 12, 1967 he obtained a continuing appointment as Associate Professor. On October 30, 1970, he was transferred to the Department of Educational Research by defendant Albert W. Brown, President of the State University College at Brockport. In a letter from President Brown dated January 26, 1976 petitioner was notified that due to reductions in the operating budget of the State College at Brockport, his continuing appointment would be terminated effective February 29, 1976 and that the termination of the appointment constituted retrenchment. The petition alleged that eight persons were retrenched under the budget cutting at Brockport State College, five non-instructional personnel such as maintenance men and three academic personnel. It alleged that the Department of Educational Research must have been declared a

retrenchment unit. No hearing was accorded petitioner prior to the termination notice. President Brown failed to consult with faculty senate of Brockport prior to retrenchment in order to establish the procedures and criteria with which to guide the retrenchment. In addition, President Brown did not first terminate in the Department of Educational Research untenured faculty members and two assistant professors before reaching petitioner, an associate professor, as required by the collective bargaining agreement. On March 11, 1976 petitioner filed a grievance under the collective bargaining agreement concerning his termination. The petition seeks an administrative or judicial hearing to determine the validity of petitioner's termination of his tenured position as an associate professor in the Department of Educational Research.

Plaintiff Louis T. Di Lorenzo asserts in his first cause of action that he obtained a term appointment as professor in the Department of Educational Research on May 20, 1970. He was granted a continuing appointment at the professorial level on November 10, 1972. He received a letter identical in form to that sent to petitioner Farrell notifying him that his continuing appointment as professor in the Educational Research Department would be terminated effective on February 29, 1976. On March 10, 1976 plaintiff filed a grievance with respect to the termination under the collective bargaining agreement. In his first cause of action plaintiff alleges that the Chancellor of the State University of New York failed to seek the advice of the faculty senate concerning the policy to be followed in retrenchment as required by the policy articles of the State University Trustees. He asserts the right to a hearing to determine the criteria for selecting the educational unit to be retrenched and the manner in which retrenchment would be accomplished within the chosen unit. The second cause of action refers

to the collective bargaining agreement guidelines for retrenchment and a failure to follow them constituting a breach of the collective bargaining agreement.

The collective bargaining agreement between the State University of New York and the United University Professors, Inc. (UUP) in effect for years 1974 through 1976 provides for a three-step grievance procedure culminating in binding arbitration. Article 7 of the collective bargaining agreement provides, *inter alia*:

> "*Grievance Procedure*
>
> § 7.1 Purpose
>
> The purpose of this Article is to provide a prompt and efficient procedure for the investigation and resolution of grievances. The orderly process hereinafter set forth shall be the sole method for the resolution of grievances. The State, UUP and employees shall endeavor initially to resolve grievances informally when feasible.
>
> § 7.2 Definition
>
> a. A grievance is a dispute concerning the interpretation, application or claimed violation of a specific term or provisions of this Agreement.
>
> b. The term grievance shall also be deemed to mean a claimed failure by the State to follow the procedural steps provided by Articles of the Policies relating to appointment and promotion of academic employees or relating to appointment, promotion or evaluation of professional employees (hereinafter referred to as 'Policy Articles').
>
> c. A claim of improper or unjust discipline shall be processed in accordance with Article 19, Discipline, of this Agreement and shall not be subject to the grievance procedure contained in this Article."

The gravamen of Farrell's petition and Di Lorenzo's complaint concerns the termination of their positions with the State University College at Brockport, allegedly due to budgetary restraints (retrenchment). Both parties are members of a negotiating unit covered by the collective bargaining agreement and have, in fact, submitted grievances pursuant to the grievance procedures of that agreement. The collective bargaining agreement provides for terminating an academic employee's position with the State University of New York and its constituent units when retrenchment for budgetary or organizational reasons is sought to be accomplished by the University administration. Article 35 of the collective bargaining agreement provides with respect to retrenchment:

"*Retrenchment*

§ 35.1 Retrenchment shall be defined as the termination of the employment of any academic or professional employee during any appointment, other than a temporary appointment which may be terminated at any time, as a result of financial exigency, reallocation of resources, reorganization of degree or curriculum offerings or requirements, reorganization of academic or administrative structures, programs or functions or curtailment of one or more programs or functions University-wide or at such level of organization of the University as a campus, department, unit, program or such other level of organization of the University as the Chancellor or his designee deems appropriate.

"§ 35.2 Consistent with the mission of the level or organization of the University at which retrenchment occurs, the Chancellor or his designee, after such consultation as may, in his judgment, be appropriate, shall apply retrenchment among employees holding the same or similar positions subject to retrenchment at such level of organization in inverse order of appointment within each affected group of employees hereinafter referred to, as follows:

a. Part-time employees before full-time employees,

b. Full-time academic employees holding term appointments before those holding continuing appointments.

c. Full-time professional employees holding term appointments before those holding permanent appointments.

"§ 35.3 The State will notify the persons affected by retrenchment as soon as practicable recognizing that, where circumstances permit, it is desirable to provide the following notice of termination:

a. For those holding a term appointment, at least four months.

b. For those holding a continuing or permanent appointment, at least one semester.

"§35.4 At the time of retrenchment the University shall give special consideration for placement within the University to an employee whose services might be terminated as a result of retrenchment, provided that a suitable position for which the employee is otherwise qualified is available.

"§ 35.5 For a period of two years following retrenchment, an employee removed as a result of retrenchment who is not otherwise employed in the University shall be offered reemployment in the same or similar position at the campus at which he was employed at the time of retrenchment should an opportunity for such reemployment arise. Any offer of reemployment pursuant to this Section must be accepted within 15 days after the date of the offer,

such acceptance to take effect not later than the beginning of the semester immediately following the date the offer was made. In the event such offer of reemployment is not accepted, the employee shall receive no further consideration pursuant to this Section. In the event such offer of reemployment is accepted, the employee, upon commencement of such reemployment, shall receive the following benefits to the extent permitted by applicable law, rule or regulation:

a. Seniority for purposes of retrenchment. The employee shall receive the same seniority for purposes of retrenchment as he held on the date of his termination by reason of retrenchment.

b. Appointments. An academic employee who held a continuing appointment on the date of his termination by reason of retrenchment shall resume his continuing appointment. A professional employee who held a permanent appointment on the date of his termination by reason of retrenchment and who is reemployment in the same position shall resume his permanent appointment, otherwise he shall be given a term appointment.

c. Prior service credit. An employee who held a term appointment on the date of his termination by reason of retrenchment or who held a permanent appointment but is not reemployed in the same position held prior to termination by reason of retrenchment shall be granted a new term appointment and shall be credited with all prior continuous service up to a maximum of four years for purposes of eligibility for permanent or continuing appointment.

d. Sick leave. An employee shall be credited with the sick leave accruals which he had on the date of his termination by reason of retrenchment."

President Brown asserted in his termination notices to appellants that he was exercising his authority pursuant to the retrenchment provisions of the collective bargaining agreement. Appellants have agreed to be bound by the collective bargaining agreement by their membership in the negotiating unit, irrespective of whether they personally supported the contract when approved. Whatever other rights they might have had of a procedural or constitutional nature, are deemed waived (Antinore v State of New York, 49 AD2d 6, affd 40 NY2d 921). The appellants fail to take into account that they have agreed to grant the State University of New York the right to terminate their services without a hearing upon a claimed retrenchment other than that provided by the agreement's grievance procedures and binding arbitration. They do not attack the collective bargaining process itself as a violation of constitutional due process (see Mount St. Mary's Hosp. of Niagara Falls v. Catherwood, 26 NY2d 493). The United States Supreme Court cases cited by appellants have no application to termination procedures covered by collective bargaining agreements (see Board of Regents of State Colleges v. Roth, 408 US 564; Perry v. Sindermann, 408 US 593). Indeed, this method of resolving labor disputes within the framework of a collective bargaining agreement is most favored by federal (Steelworkers v. Warrior & Gulf Co., 363 US 574) and state policy (Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v. Associated Teachers of Huntington, 30 NY2d 122). Thus appellants' argument is reduced to the proposition that their constitutional due process rights are violated by reason of the fact that the agreement to which they gave assent fails to provide a type of hearing at which they may raise issues of policy over which jurisdiction appears to be reserved by the collective bargaining agreement exclusively to the State University of New York (cf. Matter of Gupta v Boyer, 55 AD2d 1024).

A final point raised by appellants concerns the applicability of 8 NYCRR 338.14:

"BUDGET OR PROGRAM CURTAILMENT.

> The services of any members of the academic staff may be terminated in the event of financial or program retrenchment. If the chancellor anticipates that such retrenchment may be necessary, he shall seek the advice of the faculty senate concerning the policy to be followed in the reduction of staff."

The policies of the board of trustees of the State University of New York contained in Chapter 5 (subpart B) of which the above regulation is a part, have only a limited application when a collective bargaining agreement enacted pursuant to Article 14 of the Civil Service Law is in effect with respect to a particular negotiating unit within the State University system.

"8 NYCRR 343.1 APPLICABILITY.

> The provisions of the policies of the board of trustees, insofar as they apply to employees in negotiating units established pursuant to article 14 of the Civil Service Law, shall be continued, provided, however, that during periods of time where there is in effect an agreement between the state and an employee organization reached pursuant to the provisions of said article 14, the provisions of such agreement and the provisions of said policies shall both be applicable. In the event the provisions of the agreement are different from the provisions of said policies, the provisions of the agreement shall be controlling."

A close analysis of these two provisions leads to the conclusion that the collective bargaining agreement and particularly its detailed procedure with respect to retrenchment, should control in light of section 343.1. Section 338.14 has as its objective the formulation of policies which could very well overlap and conflict with the detailed manner of handling retrenchment spelled out in the collective bargaining agreement. Where the approaches to this problem differ, the collective bargaining agreement should control. This is the position taken by the concurring opinion of Justice Titone in Hedley v State Univ. of N.Y. (54 AD2d 891, affd after remand 58 AD2d 576, affd upon ano point, 43 NY2d 698). The issues arising from appellants' retrenchment are exclusively governed by the collective bargaining agreement, hence the grievance procedure provided for in the agreement and if demanded, binding arbitration, provide the sole means of resolving them.

It would appear that the proper procedural vehicle for reviewing the termination of plaintiff Di Lorenzo's tenure as a professor in the Department of Educational Research is a proceeding under Article 78 to review in the nature of mandamus and not a declaration of his rights under the collective bargaining agreement, statutes, regulations and the constitution. He does not seek as his primary object a declaration of his rights, but rather a review of the legality of his termination by the administrative authorities responsible therefor. This is clearly within the purview of an Article 78 proceeding to review. However, since the necessary parties are before the court, we convert the declaratory judgment action to an Article 78 proceeding, which we may do pursuant to CPLR 103, subd [c].

The order and judgment in the proceeding brought by the petitioner Farrell should be affirmed and the judgment in the action brought by plaintiff Di Lorenzo modified by deleting the provision declaring the rights of the parties and by dismissing the complaint, and otherwise affirmed.

Dillon, Hancock, Denman and Witmer, JJ., concur.

APPENDIX C

SUPREME COURT
STATE OF NEW YORK
COUNTY OF MONROE

LOUIS T. DILORENZO,

Plaintiff,

—vs—

HUGH L. CAREY, in his official capacity as Governor of the State of New York, ERNEST L. BOYER, in his official capacity as Chancellor of the State of New York and ALBERT W. BROWN, in his official capacity as President of the State University of New York College at Brockport,

Defendants.

Motion by defendants to dismiss complaint in action for declaratory judgment, injunctive relief and money damages.

Judgment declaring rights of the parties and denying injunctive relief and money damages.

Appearances:

Joan de R. O'Byrne, of Rochester, attorney for plaintiff.

Hon. Louis J. Lefkowitz, Attorney General of the State of New York, of Albany (Paul O. Harrison, Assistant Attorney General, of counsel), attorney for defendants.

DECISION

This is an action for declaratory judgment wherein plaintiff seeks a declaration of the rights of the parties,

injunctive relief and money damages. Defendants have made a motion to dismiss the complaint stating that the motion is made pursuant to CPLR § 7804 (f) on objections in point of law. It seems that defendants' motion is mis-named as the motion is made in an action for declaratory judgment rather than in an Article 78 Proceeding. This being an action for declaratory judgment, it would be inappropriate to dismiss the complaint instead of which, the rights of the parties will be determined and declared in this decision.

The plaintiff Dr. Louis DiLorenzo has been a member of the faculty of the State University College (SUC) at Brockport since September of 1970; he was granted a continuing (tenured) appointment as Professor at that institution in September of 1973 and has since served continuously as such in the Department of Educational Administration and Supporting Services and in the Department of Educational Research. On January 26, 1976, defendant Albert W. Brown, President of SUC at Brockport, notified plaintiff by letter of the termination of his appointment, which letter stated, in part:

> "* * * The difficult financial situation facing the State of New York has required the State University to make reductions in its present operating budget and in its plans for the immediate future.
>
> It is with sincere regret that I must inform you that as a result of these reductions your continuing appointment will be terminated at the close of business on February 29, 1976. This termination of your appointment constitutes retrenchment. * * *"

An order to show cause in this action, dated February 26, 1976, was issued out of this Court (Fritsch, J.) upon application of the plaintiff, which order contained a temporary restraining order enjoining defendants from terminating plaintiff's employment, until further order of this Court.

Plaintiff contends that the termination of his employment was arbitrary and capricious and an abuse of discretion and seeks a declaratory judgment determining that defendants' actions were in violation of plaintiff's constitutional rights under the due process and equal protection clauses. Plaintiff further seeks a preliminary and a permanent injunction restraining defendants from terminating his employment, together with a judgment for money damages including counsel fees.

Defendants move to dismiss the complaint upon the ground that by the terms of a collective bargaining agreement between the State of New York (State) and the United University Professions, Inc. (UUP), plaintiff's sole remedy is limited to the grievance and arbitration procedure provided for in the agreement.

On June 20, 1974, a collective bargaining agreement was entered into between the State and UUP for a two-year period to end June 30, 1976. The Agreement was negotiated on behalf of plaintiff and other employees of the State University of New York (SUNY) between the State and UUP as representative of the negotiating unit to which plaintiff belonged. Plaintiff is bound by the terms of the agreement. Article 7 of the Agreement states the sole method for the resolution of grievances is to follow certain preliminary steps leading up to arbitration. Article 35 of the Agreement specifies the procedure to be followed to effect termination of a position by retrenchment and therefor any grievance resulting from retrenchment is arbitrable.

The constitutional rights of due process and equal protection of which plaintiff contends he was deprived were waived by the said Agreement. Inasmuch as such a waiver is not contrary to public policy, it is binding upon plaintiff (*Mount St. Mary's Hosp.* v. *Catherwood*, 26 N Y 2d 493). Plaintiff having waived his constitutional rights, the sole and exclusive procedure for review of the termi-

nation of his employment is by arbitration in accordance with the provisions of the Agreement between the State and UUP (*Antinore* v. *State of New York*, 49 A D 2d 6).

The unreported decision in the case of *Donofrio* v. *Hastings*, Monroe County Supreme Court, (Smith, J.) is not controlling. That case was decided July 9, 1975, nine days before the decision in *Antinore* v. *State of New York, supra*. Other cases cited by plaintiff in support of his contentions involve neither waiver nor collective bargaining agreements.

Judgment is directed declaring that plaintiff waived his rights to due process and equal protection of the law as guaranteed by the Constitution; that his sole and exclusive remedy in the premises is by way of the grievance procedure set forth in the collective bargaining agreement; that he is not entitled to either a preliminary injunction or a permanent injunction; that he is not entitled to recover money damages from the defendants; and that the temporary restraining order of February 26, 1976, be vacated.

Let judgment enter accordingly.

Dated, May 24, 1976.

/s/ ARTHUR ERVIN BLAUVELT
Justice Supreme Court

SUPREME COURT
STATE OF NEW YORK
COUNTY OF MONROE

In the Matter of the Application of

JAMES A. FARRELL,
Petitioner,
For a Judgment Pursuant to Article 78 CPLR

—vs—

HUGH CAREY, as Governor of the State of New York; ERNEST L. BOYER, as Chancellor of the State University of New York; and ALBERT W. BROWN, as President of the State University College at Brockport,
Respondents.

Article 78 Proceeding.

Judgment for respondents dismissing the proceeding.

Appearances:

Harris, Maloney, Horwitz & Evans, of Rochester (Richard J. Evans, of counsel), attorneys for petitioner.

Hon. Louis J. Lefkowitz, Attorney General of the State of New York, of Albany (Peter R. Tinsley, Assistant Attorney General, of counsel), attorney for respondents.

MEMORANDUM

This is a special proceeding under Article 78 of the Civil Practice Law and Rules to review a determination

of respondent Brown, dated January 26, 1976, which informed petitioner that his tenured appointment as an Associate Professor at the State University College (SUC) at Brockport would be terminated on February 29, 1976.

The petitioner Dr. James A. Farrell has been a member of the faculty of SUC at Brockport since September of 1965; he was granted a continuing (tenured) appointment as Associate Professor at that institution in September of 1967 and since September of 1970 has served in that capacity in the Department of Educational Research.

On January 26, 1976, respondent Albert W. Brown, President of SUC at Brockport, notified petitioner by letter of the termination of his appointment, which letter stated, in part:

> "* * * The difficult financial situation facing the State of New York has required the State University to make reductions in its present operating budget and in its plans for the immediate future.
>
> It is with sincere regret that I must inform you that as a result of these reductions your continuing appointment will be terminated at the close of business on February 29, 1976. This termination of your appointment constitutes retrenchment. * * *"

This proceeding was instituted by petitioner by Order to show cause dated February 26, 1976 issued out of this Court (Fritsch, J.) which contained a temporary restraining order enjoining the respondents from terminating petitioner's employment, pending the hearing and determination of this application.

Petitioner contends that the termination of his employment was illegal, arbitrary, capricious and null and void because he was not accorded his constitutional due process rights, in that he was not given notice of the

intention to terminate his position and he was not afforded a hearing thereon with representation by counsel and the right to present evidence and cross examine adverse witnesses at such a hearing.

Respondents have not filed an answer to the petition, but have raised a preliminary objection in point of law by a motion to dismiss the petition upon the ground that by the terms of a collective bargaining agreement between the State of New York (State) and the United University Professions, Inc. (UUP), petitioner's sole remedy is limited to the grievance and arbitration procedure provided for in the agreement.

On June 20, 1974, a collective bargaining agreement was entered into betwen the State and UUP for a two-year period to end June 30, 1976. The agreement was negotiated on behalf of petitioner and other employees of the State University of New York (SUNY) between the State and UUP as representative of the negotiating unit to which petitioner belonged. Petitioner is bound by the terms of the Agreement. Article 7 of the Agreement states the sole method for the resolution of grievances is to follow certain preliminary steps leading up to arbitration. Article 35 of the Agreement specifies the procedure to be followed to effect termination of a position by retrenchment and therefor any grievance resulting from retrenchment is arbitrable.

It is the opinion of this Court that the constitutional rights of due process of which petitioner claims he was deprived were waived by the said Agreement. Inasmuch as such a waiver is not contrary to public policy, it is binding upon petitioner (*Mount St. Mary's Hosp.* v. *Catherwood*, 26 N Y 2d 493). Petitioner having waived his constitutional rights, the sole and exclusive procedure for review of the termination of his employment is by arbitration in accordance with the provisions of the Agreement between the State and UUP (*Antinore* v. *State of New York*, 49 A D 2d 6).

Accordingly, motion of respondents to dismiss the proceeding and to vacate the temporary restraining order of February 26, 1976, is granted and judgment is directed in favor of respondents.

Submit order.

Dated, May 24, 1976.

/s/ Arthur Ervin Blauvelt
Justice Supreme Court

Original of decision and all motion papers have been forwarded to Monroe County Clerk's Office.

ARTHUR ERVIN BLAUVELT, J.S.C.

APPENDIX D

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

99 Washington Avenue
Albany, New York 12230
November 6, 1978

Professor Mathew Sinkin [*sic*]
School of Law
South Methodist University
Dallas, Texas 75257

Dear Professor Sinkin: [*sic*]

At the request of Professor Sondra Dourant, I relate here for your information certain findings as related to me by Mr. Leonard Powell, Chief of the Bureau of Education Data Systems of the New York State Education Department.

For school fiscal year 1977-78 there were employed in New York States Public Schools 172,394 teachers of which 144,826 or 84% were tenured, 24,011 or 13.9% were probationary, 3,097 or 1.8% were substitutes, and 460 or .3% were classified as unknown.

For your further information, you are advised that in New York State permanent part-time teachers (those employed for less than a full day on a regular basis) who were not previously tenured employees and not teaching on a part-time basis at the request of their board of education, are neither considered probationary, tenured, or substitute employees. This class of people have no eligibility for either probationary or tenure status and are not likely those considered among the ranks of those listed as unknown.

I trust that the foregoing information will meet your needs.

Very truly yours,

/s/ Vito F. Longo
VITO F. LONGO

VFL/cs

Enclosure
cc: Professor Sondra Dourant

Supreme Court, U.S.
FILED
JAN 19 1979
MICHAEL RODAK, JR., CLERK

[J-4]

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-965

JAMES A. FARRELL and LOUIS T. DiLORENZO,

Petitioners,

— against —

HUGH CAREY, as Governor of the State of New York, ERNEST L. BOYER, as Chancellor of the State University of New York, and ALBERT W. BROWN, as President of the State University College at Brockport,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING CERTIORARI

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BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING CERTIORARI

Statement

The respondents submit this brief in opposition to the petitioners' application for certiorari to review the order of the Court of Appeals of the State of New York which dismissed the appeals taken by the petitioners from an order of the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department. The Appellate Division, where the separately instituted DiLorenzo action and Farrell proceeding had been consolidated due to the unity of the issue involved, *i.e.*, the legality of the termination of positions with the State University due to budgetary restraints, unanimously modified the judgment of the Supreme Court of the State of New York

and dismissed the complaint in the action brought by the petitioner DiLorenzo and unanimously affirmed the judgment of the Supreme Court and dismissed the proceeding brought by the petitioner Farrell.

Questions Presented

1. Should certiorari be denied because of the failure of the petitioners to establish that they have exhausted all available and adequate administrative remedies?

2. Should not the petitioners be legally bound to the procedures provided in the collective bargaining agreement negotiated in their behalf by their union?

3. Should not the petitioners be legally bound to the waiver of judicial due process contained in the collective bargaining agreement negotiated in their behalf?

Respondents contend that the questions should be answered in the affirmative.

Facts

The only facts available to the New York State courts were presented in the petition, the complaint, and in respondents' affidavits and exhibits since the respondents, in lieu of serving answers to the petition and complaint, moved to dismiss in each instance on the grounds of failure to state a cause of action and failure to exhaust administrative remedies. The records in each of these matters (Monroe County Clerk's Index Nos. 2510/76 and 2476/76) establish that the DiLorenzo action and the Farrell proceeding were commenced on or about February 29, 1976. Annexed to the respondents' motion papers in the New York State Supreme Court are exhibits which establish that DiLorenzo instituted a grievance proceeding pursuant to the collective bargaining agreement between his union and his employer on March 10 and Farrell acted likewise on March 11. The case had been argued before Supreme Court Justice

BLAUVELT on March 9, 1976. The record is barren of proof as to whether the grievance and arbitration procedures were pursued, much less concluded.

The underlying facts are substantially as alleged herein by petitioners. They were both tenured professors at the State University at Brockport when in January, 1976 they were advised that their appointments would be terminated as part of a retrenchment made necessary by a reduction in the State University operating budget. At the time of the retrenchment a collective bargaining agreement was in effect between the petitioners' union representative, the United University Professions, Inc. (UUP) and the State University. The agreement, as set forth in the Appellate Division decision appended to the petition in this Court, contained an Article 35 which dealt extensively with retrenchment and the procedures associated therewith. In addition the agreement set forth in Article 7 thereof, a grievance and arbitration procedure for the resolution of disputes resulting from the interpretation and application of provisions of the agreement. Judge BLAUVELT specifically held in each case that "any grievance resulting from retrenchment is arbitrable" (Petitioners' Appendix, pp. 21a and 25a).

As previously noted, the petitioners initially chose to ignore the administrative remedies provided by the agreement and commenced separate suits for reinstatement.

The New York State Supreme Court in parallel rulings in each case found that the petitioners herein had waived their rights to the totality of due process available in the courts of New York State as a result of the provisions of Article 7 of the agreement and that their sole and exclusive remedy was the administrative remedies of Article 7 of the agreement.

The opinion of the Appellate Division of the Supreme Court of the State of New York (62 AD2d 583) reviewed the facts and the agreement provisions and stated:

> "Appellants have agreed to be bound by the collective bargaining agreement by their membership in the negotiating unit, irrespective of whether they personally supported the contract when approved. Whatever other rights they might have had of a procedural or constitutional nature, are deemed waived (Antinore v. State of New York, 49 A D 2d 6 affd 40 NY 2d 921). The Appellants fail to take into account that they have agreed to grant the State University of New York the right to terminate their services without a hearing upon a claimed retrenchment other than that provided by the agreement's grievance procedures and binding arbitration."

The Appellate Division affirmed the judgments of the Supreme Court dismissing the petition and the complaint.

The petitioners' appeal as of right to the New York State Court of Appeals was dismissed on motion of the respondents on the ground that "no substantial constitutional question is directly involved (CPLR 5601[b][1]."

The appellants could have but did not move for permission to appeal to the Court of Appeals (CPLR 5602).

The petition for a writ of certiorari was received by respondents' attorney on December 20, 1978.

ARGUMENT

POINT I

PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THEY HAVE EXHAUSTED ALL AVAILABLE AND ADEQUATE ADMINISTRATIVE REMEDIES.

Both the New York State Supreme Court and the Appellate Division of the Supreme Court held in their decisions herein that the collective bargaining agreement between the UUP and the State University made available to the petitioners administrative procedures by which they could challenge the retrenchment. Indeed Joan de R. O'Byrne, attorney for DiLorenzo stated in an affidavit appearing at page A-30 of the record in the Appellate Division:

> "3. That there is no question that plaintiff has a grievance remedy under the collective bargaining agreement to prosecute alleged violations of such agreement * * *."

The paragraph goes on to argue that constitutional issues cannot be resolved by an arbitrator but that argument begs the question. A similar disclaimer of availability of an administrative remedy is found in the Farrell petition and as a bare conclusion of law is, it is submitted, equally ineffective. The issue is whether the grievance procedure could have aired the factual issues concerning the basis for petitioners' termination and that was never reached because petitioners both failed to exhaust those remedies.

New York State law requires that administrative remedies be exhausted before resort to the Courts is had (CPLR § 7801 (1); *Rieder* v *State University of New York*, 39 NY2d 845). Had the petitioners exhausted the arbitration process resort to New York State Courts to confirm, vacate or modify an arbitration award is available under CPLR Article 75.

This Court has held that there is a "strong presumption favoring arbitrability" (*Nolde Bros. Inc.* v *Bakery Workers*, 430 US 243, 254, 51 L ed 2d 300 [1977]) and that public policy favors the exclusion of the Courts from matters which are subject to arbitration (*Buffalo Forge Co.* v *Steelworkers*, 428 US 397, 49 L ed 2d 1022 [1976]; *United Steelworkers* v *Warrior & Gulf Navigating Co.*, 363 US 574 [1960]). It has also been held that arbitration can satisfy the requirements of due process (*Chung* v *Park*, 514 F2d 382 [3d Cir., 1975] cert. den. 423 US 948). The administrative remedies available to the petitioners herein have not been attacked nor have they been shown to have been exhausted - they should be deemed to have been available and adequate and the petitioners' failure to exhaust should, it is submitted, preclude the requested review (*cf. McGee* v *United States*, 402 US 479, 484, 29 L ed 2d 47, 53 [1971]; *Turnstall* v *Brotherhood of Locomotive Firemen & Engineermen*, 323 US 210, 213, 65 S Ct 235 [1944]; *Mills*

v *Long Island R.R. Co.*, 515 F2d 181, 183 [2d Cir., 1975]; *Wagle* v *Murray*, 546 F2d 1329, 1332; *Eisen* v *Eastman*, 421 F2d 560, 567).

POINT II

THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS WAIVED THE DUE PROCESS WHICH WAS AVAILABLE TO THEM UNDER THE COLLECTIVE BARGAINING AGREEMENT AND THEY SHOULD OTHERWISE BE HELD TO THE TERMS OF THAT AGREEMENT.

The petitioners argue at length that the so-called doctrine enunciated in *Antinore* v *State of New York*, 40 NY2d 921, affg 49 AD2d 6 is central to this application and that novel questions are presented herein. Respondents submit that not only does the instant petition not present the *Antinore* "doctrine" for review but that the substantive issue which petitioners purport to raise is well settled by prior decisions of this Court.

As discussed in Point I (*supra*) the petitioners were afforded due process under the collective bargaining agreement, which due process they chose to waive by their failure to pursue that remedy. They should not now be heard to claim that such rights were denied to them. Further, as acknowledged in the petition (at p. 11), *Antinore* held that the minimum requirements of due process had been satisfied by the procedures established in the collective bargaining agreement. Similar conclusions have been reached in *Mills* v *Long Island Railroad Co.*, 515 F2d 181 (2d Cir., 1975) and *Chung* v *Park*, 514 F2d 382 (3d Cir., 1975), cert. den., 423 US 948 (1975) and compare *Lake Michigan College Federation of Teachers* v *Lake Michigan Community College*, 518 F2d 1091 cert. den. 427 US 904.

Fundamental to the issue presented herein are the many decisions of this Court holding that due process is a flexible

concept the dimensions of which may vary according to the circumstances (*Mathews* v *Eldridge*, 424 US 319, 47 L ed 2d 18 [1976]; *Morrissey* v *Brewer*, 408 US 471, 33 L ed 2d 484 [1972]; *Cafeteria Workers* v *McElroy*, 367 US 886, 6 L ed 2d 1230 [1961]). The provisions of the collective bargaining agreement providing for grievance procedures and arbitration (see *Chung* v *Park*, *supra*), together with New York Civil Practice Law and Rules Article 75 providing for review of an arbitration award, grant to the petitioners the process which is due when the State finds it necessary to terminate positions as the result of financial exigencies. Such circumstances, it is submitted, are different from, and to be contrasted with circumstances where termination of a tenured employee results from a disciplinary proceeding or termination during a probationary period where tenure has not been acquired but a stigma attaches to such action.

In *Klein* v *Board of Higher Education*, 434 F Supp 1113 (SDNY, 1977) the plaintiffs were formerly tenured members of the faculty of the City University of New York whose employment had been terminated by retrenchment. The Court, without discussing the question of whether the collective bargaining agreement between plaintiffs and defendant may have constituted a waiver of due process, held that the layoffs due to financial exigencies were clearly within the discretionary area reserved to the defendants (citing *Bignall* v *North Idaho College*, 538 F2d 243 [9th Cir., 1976] and *Johnson* v *Board of Regents of University of Wisconsin*, 377 F Supp 227 [WD Wis., 1974], affd 510 F2d 975 [7th Cir., 1975]), that plaintiffs were not entitled to hearings prior to the termination decisions, and that the post termination hearings which did not give them an opportunity to challenge the existence of financial exigency were nevertheless constitutionally adequate.

Insofar as petitioners complain of the denial of the full panoply of due process available through judicial resolution of their claim, respondents submit that they were properly found to have waived their right thereto.

In *Arnett* v *Kennedy*, 416 US 134, 40 L ed 2d 15 (1974) Mr. Justice RHINQUIST stated:

> "that where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant * * * must take the bitter with the sweet." (416 US at 153-154)

The Constitution, this Court has held, does not forbid requiring a person to make a choice even where it may be of constitutional dimension (*Middendorf* v *Henry*, 425 US 25, 47 L ed 2d 556; *McGautha* v *California*, 402 US 183, 28 L ed 2d 711 [1971]). Surely then the petitioners were properly held to the choice which was made for them by their representative in the collective bargaining agreement.

CONCLUSION

PETITIONERS' APPLICATION FOR CERTIORARI SHOULD BE DENIED.

Dated: January 16, 1979

Respectfully submitted,

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of New York
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Supreme Court, U. S.
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Respondents.

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The State argues that Petitioners cannot be heard in this Court upon the constitutional issues presented, squarely framed by the pleadings and fully decided by the courts below, because Petitioners should have first secured an arbitral determination of the effect of the collective agreement:

> The issue is *whether* the grievance procedure *could* have aired the factual issues concerning the basis for petitioners' termination and that was never reached because petitioners both failed to exhaust that remedy. Brief in Opposition at 5 (emphasis added).

An arbitrator was never called on to consider the question because Petitioners agreed with the State's interpretation of the collective agreement. Petitioners' pleadings asserted that the instant collective agreement impermissibly bargained away their constitutional right to contest the existence of the ground asserted as justifying their dismissals and the reasonableness of the standards and procedures employed to single them out for termination. The State's Motion to Dismiss did not contend that the collective agreement allowed review of these questions. Rather, the State relied upon a theory of waiver of due process: that, under *Antinore* v. *State of New York*, 371 N.Y.S.2d 213 (4th Dept. 1975), *aff'd mem.*, 40 N.Y.2d 921, 358 N.E.2d 368 (1976), it was constitutionally irrelevant that Petitioners could not vindicate their constitutional rights. The State could have moved to dismiss upon the ground that the collective agreement did not foreclose review of the procedures and standards employed to terminate these professors, thereby placing that question in issue; but, the State did not challenge Petitioners' reading of the collective agreement. The only question raised and passed upon below was whether it is constitutionally permissible for a public sector collective agreement to do just what the parties agreed it did, that is, waive the individual's constitutional right to due process. Accordingly, under New York law, there was nothing to arbitrate—there was no procedure to exhaust—because the parties agreed about the effects of the collective agreement and differed only upon the constitutional permissibility of those effects.*

---

* The State points out that "This Court has held that there is a 'strong presumption favoring arbitrability'. . . ." citing a series of cases under federal labor law. Brief in Opposition at 5. That presumption is irrelevant, however, where the parties are agreed as to the purport of a collective agreement and differ only as to the permissibility of a provision under external law, *i.e.*, as to legal questions an arbitrator is not empowered to decide. In any event, the State also neglects to point out that there is no such presumption under New York's public employment bargaining law:

> [I]n arbitrations which proceed under the authority of the Taylor law, the scope of the particular arbitration clause, and thus whether the question sought to be submitted to arbitration is within or without the ambit of that clause, is to be determined by the courts. In making such determinations the courts are to be guided by the principle that the agreement to arbitrate must be express, direct and unequivocal as to the issues or disputes to be submitted to arbitration; anything less will lead to a denial of arbitration. *Acting Superintendent* v. *United Liverpool Faculty Ass'n*, 42 N.Y.2d 509, 510-511, 369 N.E. 2d 746, 747, 399 NYS 2d 189, 190 (1977) (emphasis added).

This decision was briefed by Petitioners and argued to the Appellate Division in the instant case. Under it, in order for there to be anything for Petitioners to exhaust, the State would have had to dispute Petitioners' pleadings and assert that Petitioners could secure arbitral review of the merits of their dismissals; the State did not then so assert, nor does it now.

It should be noted that the growth of public sector collective bargaining engenders a host of constitutional questions which this Court has commenced to resolve. *City of Madison* v. *WERC*, 427 U.S. 167 (1976), *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). A major question, which this Court has not yet reached, is whether the State may limit an individual's constitutional rights by agreement with a public employee union; that is, whether a public employee union may "waive" rights protected by the fourteenth amendment. Note, *Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation*, 89 Harv. L. Rev. 752, 777-780 (1976); Baird & McArthur, *Constitutional Due Process and the Negotiation of Grievance Procedures in Public Employment*, 5 J. Law & Educ. 209 (1976); *Cf.* Note, *Union Waiver of Constitutional Rights: Academic Freedom as a Bargaining Chip in Teacher Contracts*, 49 Colo. L. Rev. 299 (1978). The disposition below frames that issue with just the precision and clarity this Court expects in constitutional cases.

In fact, the State's second argument is wholly inconsistent with its "exhaustion" argument. The State candidly argues that Petitioners "were properly held to the choice *which was made for them* by their representative in the collective bargaining agreement." Brief in Opposition at 8 (emphasis added). This assertion clearly joins the constitutional issue. Petitioners claim that a collective bargaining representative cannot bargain away an individual's right to due process; the State claims it can, relying upon the plurality opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 153-154 (1974). ("[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures . . . [employed to divest that right] a litigant . . . must take the bitter with the sweet.") Brief in Opposition at 8.

There is no doubt that the "waiver" theory, adopted in *Antinore* and applied below, fully embraces the positivist position of the *Arnett* plurality, "[H]e [the dismissed civil servant] can no more claim exemption from the negotiated agreement than may a citizen . . . withhold compliance with a statute. . . ." *Antinore* v. *State*, 371 N.Y.S.2d at 217. As Mr. Justice Stevens has pointed out, however, six members of this Court had unequivocally rejected that reasoning. *Bishop* v. *Wood*, 426 U.S. 341, n. 8 at 345 (1976). Thus, the State's position rests upon an interpretation of the fourteenth amendment that this Court has refused to accept. It is that very difference that engenders the intolerable constitutional conflict between the federal judiciary and the state courts in New York, discussed in the Petition for Certiorari at 14-15. Petitioners suggest that the State's justification for the

waiver theory forcefully argues for the grant of the Writ of Certiorari.

Respectfully submitted,

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